A Global Perspective on Current Regulatory Reform: Rejection, Relocation, or Reinvention?

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A Global Perspective on Current Regulatory Reforms: Rejection, Relocation, or Reinvention?

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Dean Alfred Aman's article addresses recent U.S. administrations' attempts at regulatory reform and notes that as far as the actual reforms are concerned, there are more similarities over time than differences. The globalization of politics and markets and manufacturing, in particular, has helped create global political economic forces that militate in favor of various forms of deregulation and privatization not only in the United States, but in other western democracies as well. Dean Aman focuses on the United States, noting that globalization has reduced the effectiveness of local and national regulators, especially since firms are increasingly free to choose where to locate plants and employ labor. He considers the Reagan, Bush, and Clinton administrations' market-oriented regulatory reforms, and explains their similarities and continuities in terms of the ways in which modern nation-states cope with and seek to remain competitive in the global economy. He notes some important differences among these administrations, however, and argues that reformers who advocate market approaches as a means to collective ends, rather than as ends in themselves, are likely to be more receptive to the development of new global legal regimes.

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This paper is part of a larger work in progress that compares changes in public law in the U.K. with those in the U.S. See ALFRED AMAN AND PAUL CRAIG, GLOBALIZATION AND REGULATORY REFORM IN THE U.S. AND THE U.K. (forthcoming).
I. INTRODUCTION

In *The Globalization of Politics*, Evan Luard argued that:

the welfare of ordinary men and women no longer depends primarily on the actions of their own governments. It depends, far more, on actions and decisions reached, far beyond the frontiers of their own state, by other governments or by international bodies taking decisions collectively. Political activity devoted to determining which political leader or which political party rules in their own state therefore becomes increasingly irrelevant.¹

Luard’s suggestion that local politics, parties, and leaders are “increasingly irrelevant” in a global economy may be overstated but is it fundamentally wrong? My answer is a qualified “no” for reasons having to do with the relationship between law and place and, in particular, the dynamics of this relationship in the context of domestic regulation and deregulation in the Reagan, Bush, and Clinton Administrations.

One might have expected regulatory reform to have differed significantly between the Reagan and Bush Administrations and the Clinton-Gore Administration. When the administrations changed in 1992, some commentators anticipated substantial changes in the direction of regulation as well as the possibility of re-regulation in some areas (such as the environmental area).² Significant differences in the direction and outcome of regulatory reform among these administrations, however, have been far fewer than anticipated, despite marked differences in their political rhetoric.³ I will argue that the reason for this is that the trend toward

deregulation and greater reliance on market forces that began in the 1970s has continued throughout these administrations. In fact, many of the deregulatory reforms advocated by the Reagan and Bush Administrations and those of the Clinton-Gore Administration are quite similar. What accounts for this? This is the main question of this essay.

In Part II, I argue that a global perspective on regulatory issues helps account for the fact that recent domestic regulatory reforms designed around conflicting principles have led to essentially the same results. Part III then reviews the recent history of deregulatory reform in the United States in more detail, to consider why this should be the case. My argument in Part III is that the current globalization of politics, markets, capital, and labor involves factors that have had a significant impact on regulatory outcomes, domestic policy differences notwithstanding.

Part IV then looks ahead to consider the future of regulatory reforms, focusing especially on some of the Clinton-Gore proposals to reinvent government. In the Conclusion, I argue that the proposals to reinvent government may augur significant regulatory reforms, since these proposals are more responsive to current global conditions discussed in Part III and offer global approaches to regulatory reform and institution building. Thus, the similarities between domestic deregulatory reforms in the recent past should not be misread as implying that the federal government has no role to play in affecting the relationship between national and global policy spheres.

II. GLOBALIZATION AND THE REJECTION, RELOCATION, AND REINVENTION OF GOVERNMENT

In terms of this symposium's theme of law and place, globalization, particularly from the viewpoint of multinational corporations, might seem to render a sense of any particular place irrelevant, except as a decision-
making variable with respect to the efficient location or relocation of a facility or plant. In the global economy, "a place" can be "any place" and thus "no place" at all. This sense of place or placelessness has consequences for law and regulatory reform. The globalization of markets, the ease with which capital can flow around the world, and the mobility of industries to locate or expand production in the most efficient places possible can significantly limit the effectiveness of State-centered regulators. The market orientation of multinational corporations and their ability to seek cheap labor and minimal regulatory costs are just two of the factors that exert a strong moderating influence on local efforts at regulation. As a result, there usually are few realistic domestic regulatory reform options open to nations actively involved in the global economy. Most of these reforms tend to be distinctly market oriented.

5. See Robert B. Reich, The Work of Nations: Preparing Ourselves for 21st Century Capitalism 69-70 (1991); Saskia Sassen, The Mobility of Labor and Capital: A Study in International Investment and Labor Flow (1988). Of course, this sense of placelessness will vary from industry to industry. Moreover, it may vary within industries. Some production in some manufacturing industries is highly mobile, but other aspects of the business, such as top management or research and development, may not be. In addition, it is sometimes easier for an industry simply to expand production in one facility rather than move to another location. No moves are made, but increased production and business will occur in one part of the world rather than another. But, as will be argued later, even the theoretical possibility of moving manufacturing around the globe and the actual impact globalization has on the lives of some people in a community helps fuel a politics that more broadly blames the impact of globalization in some industries for negative societal impacts in general. See infra at notes 6 to 13.

6. World consumption of most manufactured consumer goods, however, remains regionalized or "placed" in relatively high-income countries. Manufacturing, however, is much more global because of industry's ability to locate in least-cost jurisdictions and then export its goods to various markets, especially those in high-income countries.


8. See generally Sassen, supra note 5.

9. Regulatory reforms, especially in the western developed world, increasingly have taken the form of deregulation or privatization. These terms are not necessarily self-explanatory. They can
Though not all industries within a particular jurisdiction or nation are equally subject to intense global competition, the existence of global competition in general contributes to an overall political context that encourages domestic deregulatory reform proposals that apply across the board to all industries. Political movements and regulatory trends do not tend to discriminate among industries once the momentum for certain reforms is underway. Similarly, deregulatory or antiregulatory movements do not differentiate well among industries. If the costs of domestic regulation or labor mean that certain industries are more or less effective global competitors than others, regulation and its costs in general are a major focus around which a certain kind of deregulatory politics can develop. Thus, when the effects of the globalization of manufacturing in certain industries result in the relocation of plants from one part of the world to another, the negative impact this has on individuals and the communities in which these facilities closed reinforces the anti-government ideology underlying broader domestic deregulatory politics and rhetoric. The impact of global competition on the domestic politics of regulation thus goes well beyond the industries in which this competition is most intense. Globalization can, indeed, have very visible, negative effects on communities and individuals' lives. As noted above, some industries may close down and relocate to other jurisdictions or countries. Others may lose market share and downsize their workforces.”

embody various degrees of governmental involvement and responsibility. For example, the State may wish to privatize certain governmental factions such as prisons which, nevertheless, remain a State responsibility, with private corporations acting as State agents. On the other hand, the government may wish to withdraw completely from the regulation of an area leaving, for example, the pricing of oil or natural gas at the wellhead completely to market forces. Still, in other instances the government may wish to "deregulate" by substituting market-oriented regulatory approaches for command-control approaches. Market-based regulation, though less intrusive, still represents a form of regulation. The State can also fully deregulate, as it did with airline pricing, by returning all such matters to the market. All of these "deregulatory" approaches, however, have in common at least some reliance on markets and market forces. Moreover, the language of markets, as well as market values such as efficiency, features prominently in the political and policy debates leading up to these reforms.


10. See generally ELLIS W. HAWLEY, THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIGUITY 3-16 (1969). The concept of monopoly that underlay much New Deal regulation was susceptible to a variety of meanings and was widely extended to industries such as some aspects of the trucking and transportation industry that did not technically, from an economic point of view, suffer such market failure problems. Id.
considerably. At a minimum, the result for many jurisdictions can be layoffs, fewer jobs, and a lower tax base. These effects, in turn, lend practical significance to abstract political arguments for a minimalist approach to government, especially when this means the elimination of costs that arguably might make the company in question more competitive. In short, the negative impact of globalization—its impact on local industries and jobs—is one thing, but the ideological commitment to deregulation that overlooks any particular industry's posture is another. The proof necessary to help support a political rhetoric that advocates less regulation or none at all across the board cannot be supplied by economics alone, but requires ideological support in the form of principles of generality from one industry's needs to those of another.11

In short, the globalization of the economy intensifies certain local factors, as local jurisdictions are drawn into competition for global industries. In the United States, the increasing ability of industries to avoid, in both theory and practice, the regulatory demands of one jurisdiction by moving or threatening to move to another,2 fuels an anti-regulatory rhetoric at "local" levels of any scale of government. The contemporary scenario is one in which regulatory politics is no longer solely a local or purely domestic enterprise.

11. Of course, there are also positive effects of globalization. Some industries will benefit from new markets and jobs will increase. Such positive effects, however, are equated with the market, not regulation. The negative effects of globalization usually are linked to regulation because any increase in the costs of production can be viewed as significantly affecting an industry's competitiveness, particularly if other competitors in other states or countries are not subjected to the same rules. Regulation in the form of trade barriers has not been particularly successful; nor has it, thus far, been a politically viable response to the negative effects of globalization. Whether this is due to the dangers of retaliation and trade wars or the complexity of effectively implementing trade barrier legislation, such reforms have not, to date, been successful. See generally Kent E. Calder, STRATEGIC CAPITALISM: PRIVATE BUSINESS AND PUBLIC PURPOSE IN JAPANESE INDUSTRIAL FINANCE (1993). It may be, however, that trade barriers are or will be more effective when imposed by regional trading blocks, rather than individual countries. See generally William J. Davey, European Integration: Reflections on its Limits and Effects, 1 Ind. J. Global Legal Stud. 185 (1993).

12. See Jeffery Atik, Investment Contests and Subsidy Limitations in the EC, 32 Va. J. Int'l L. 837 (1992); Sassen, supra note 5. There is debate in the literature regarding the impact of domestic environmental regulatory costs on the decisions of corporations to relocate. See Richard B. Stewart, Environmental Regulation and International Competitiveness, 102 Yale L.J. 2039, 2061-86 (1993); Alfred C. Aman, Jr., The Earth As Eggshell Victim: A Global Perspective on Domestic Regulation, 102 Yale L.J. 2107, 2109 n.5 (1993). But when one adds in labor costs as well, it is clear that the overall domestic regulatory environment certainly is a significant factor considered by companies seeking to maximize their global competitiveness. See Reich, supra note 5.
More important, these same global factors also encourage increasingly intense international competition among states and cities within the U.S. to attract and keep industries that they believe can create high quality jobs and economic growth. The battle among nation-states for markets has long been a global one. The battle for the industries that can produce the goods sold in those markets and the jobs that go with them is now also global and more intense than ever before. Though the location of a plant or manufacturing operation turns on numerous, primarily cost-related factors, low taxes, low governmental services, and the imposition of minimal regulatory costs on industries located in these jurisdictions increasingly constitute important elements of a jurisdiction's strategy to attract industry and jobs to a particular locale.

Individual states and municipalities within the U.S., eager to attract new investment and to retain their current industries, have a great interest in gaining control of as many factors as possible affecting firms' decisions to locate to or remain in the jurisdiction. Thus, closely related to global incentives for regulatory cost-cutting and the imposition of lower taxes at the federal, state, and local levels is the increased desire of each particular jurisdiction seeking economic investment to control its own costs. Relocating federal regulatory responsibility for costly regulatory programs in the individual states arguably gives states greater cost control over these programs and helps make such reforms popular. Thus, though political and constitutional arguments in favor of reallocating federal power to the states are not new, the recent re-emergence of the Tenth Amendment as a politically viable and popular guideline is, nevertheless, a major political shift in the way we have viewed federal-state relations since the New Deal. What some commentators call the "radical devolution" of federal power to the states, is particularly appealing to states as a basis for

14. See, e.g., Senator Bob Dole's remarks on the Senate floor:
   This [the 10th Amendment] is an amendment that many here in Washington seem to have forgotten over the years, as more and more power has been taken away from the states and placed in the hands of Federal bureaucrats.
   As I said in my remarks on the first day of this session, if I have one goal for the 104th Congress, it is that we will dust off the 10th Amendment and restore it to its rightful place in our Constitution.
competing not only with one another for industry and jobs, but also with other locations around the world. This desire to compete more directly for the location of the "right" kind of industry in one's state helps fuel the political rhetoric for returning power to the states; restructuring federal-state relations to fit the image of a Jeffersonian past may have some political appeal, but what also drives this realignment is the increasing intensity of direct competition for economic prosperity among states, which is a major strand in the political fabric of regulatory reform today.\textsuperscript{6}

Increasing a state's power to control the costs imposed on its inhabitants and potential investors through devolution is, however, only one side of current trends. There are also forces operating simultaneously to reinforce federal powers. Some of these involve the "old" idea of a national public interest.\textsuperscript{7} Even advanced or radical devolution proposals would not cancel all of these factors. For example, even if major government programs such as welfare are returned to the states, some basic national guidelines will

\textsuperscript{6} See, e.g., Personal Responsibility Act of 1995, H.R. 4, 104th Cong., 1st Sess. (1995). Republicans have put forward a proposal now advocated by William Bennett and Lamar Alexander—both former secretaries of the Department of Education—to abolish that department. Bennett has remarked that, "the national government has become meddlesome, intrusive, and bullying," and "it's now clear that the federal government will eventually break whatever it touches." Alexander, a candidate for the 1996 presidency, while tempering his remarks somewhat, still believes that the states are more capable at dealing with certain social issues—education being just one of them. Mary McGrory, \textit{Doritos and Baloney}, \textit{WASH. POST}, Jan. 29, 1995, at Cl, C5.

\textsuperscript{7} An expanded concept of a national public interest is now very much under attack. But it is important to emphasize that, closely related to the debate over what role the federal government should or should not play is the question of what theory of the nation-state is viable in the increasingly global world in which we live. Nation-states remain important, but their role and power seem no longer as clear or as dominant as before there was as much global interdependence as there is today. More important, globalization today seems more and more driven by multinational companies, not just nation-states, and these companies do not necessarily have a clear state attachment or identification. See LESLIE SKL AIR, \textit{supra} note 5. For a rethinking of the theory of the State in the context of global migration, see Jost Delbrück, \textit{Global Migration—Immigration—Multiethnicity: Challenges to the Concept of the Nation-State}, 2 IND. J. GLOBAL LEGAL STUD. 45 (1994).

What do we expect from the national government? For some, the role of the State at the national level should primarily be restricted to foreign affairs and, perhaps, some national entitlement programs like Social Security or crimes that involve more than one state. But communications or environmental issues, for example, require national standards since neither pollution nor computers, television, radio, or telephones respect state boundaries. See also R.W. Apple, Jr., \textit{States of Mind: You Say You Want A Devolution}, \textit{N.Y. TIMES}, Jan. 29, 1995, at D1 (for a discussion of the current debate on welfare reform and the role of the federal government).
remain necessary to maintain uniform minimum standards and prevent destructive competition among the states. In addition, governments will not easily give up power amassed at the federal level since the nation-state has interests of its own it seeks to preserve, for self-serving bureaucratic reasons, and also because it is in the interest of nation-states to play an increasingly active role at the global level. The responsibility of nation-states goes beyond foreign policy, traditionally conceptualized. National responsibilities also include world trade, the global environment, and global economic stability. Effective national participation at the global level requires a national "presence" in certain domestic areas affected by these global concerns. For example, if there is no effective national control over air pollution, it is difficult for a nation to speak for all fifty states and to enter into serious negotiations at the global level. In short, simultaneously with the trend toward a devolution of federal power there is also at least the beginning of an evolutionary trend toward involving the national government more directly in sharing in the responsibilities of international governance. At the national level, this trend toward multinational decisionmaking and problem-solving often expresses itself negatively in debates over the undue restriction of national sovereignty, but

19. The recent debate over loan guarantees to Mexico is evidence of this. Faced with a devalued peso and an enormous debt, Mexico turned to the United States for a loan guarantee (totaling about $50 billion) designed to forestall a financial disaster. Many financial experts question the effectiveness of the loans, given Mexico's complex economic problems. Nevertheless, the U.S. bail-out speaks to the greater role that foreign markets play in the United States' own financial and political stability. Senator Tom Daschle's (D-S.D.) remarks during the debate over the loan guarantee are indicative of this:

The loss of jobs as the economy of Mexico responds to the peso devaluation is a price that will be paid by American workers and their families. The past two years of strong export sales to Mexico have helped create about 777,000 Americans jobs directly tied to that market.

When that market collapses, those jobs are placed in jeopardy.

That is why we should recognize that the proposed loan guarantee to address Mexico's economic situation is in our national interest.


It is also significant to note the changing cabinet roles now underway with the Secretary of Treasury rather than the Secretary of State handling essentially global economic security issues. See David E. Sanger, The Education of Robert Rubin, N.Y. Times, Feb. 5, 1995, at C1.

20. An example of this is the recent debate over the World Trade Organization (WTO) in GATT. Office of the Trade Representative, Final Texts of the GATT Uruguay Round Agreements Including the Agreement Establishing the World Trade Organization (1994) (version of Apr. 15, 1994) [hereinafter WTO Agreement]. Many fear that the WTO will force substantive policy changes on Member States, thereby restricting political autonomy. Representative Snowe (R-Me.) expressed these fears during the debate over GATT:
international cooperation and multinational agreements are nonetheless increasing.\textsuperscript{21} International cooperation and regulation highlights the importance of the national government’s own role at the domestic level.

Still, for the national government to remain a relevant and effective player in the current global era, with simultaneous pulls from below and above, some reassessment of the national government is in order. Any “reinvention” of the national government and its regulatory role must be realistic, taking into account global competition and the other factors discussed above, including the global qualities of today’s corporate entities. Globalization means that the line that once may have existed between global and domestic economic and political forces, as well as the line traditionally drawn between domestic and international law, is blurry at best and often non-existent. This is because global political and especially economic forces are not particularly responsive to national boundaries and thus help forge transnational economic relationships that are not easily regulated by domestic governmental bodies alone. Global corporations and the worldwide web of economic relationships they create represent a very different kind of entity than traditionally has been the focus of domestic regulatory regimes. Market approaches to domestic regulation help to satisfy not only the domestic political demand that regulation be as cost-effective and as unobtrusive as possible, but they provide the kind of flexibility that can more easily speak effectively to global entities who do business in various countries. Particularly when viewed in this larger global context, globalization means that the central question is no longer government versus the market, as if this were an either/or choice.\textsuperscript{22}

\textsuperscript{21} What concerns me most about GATT is the new World Trade Organization. The WTO will be used to enforce GATT’s trade regulations, and membership in the WTO is a prerequisite for participating in GATT.

Frankly, I do not believe our trade negotiators when they say that many of our federal, state, and local laws are not in danger of being overturned by the WTO.

In my view, the WTO places the principles of free trade above all else. Under the WTO an individual nation’s right to enact its own consumer, environmental, and labor laws would be jeopardized because these laws could be challenged by other countries as “barriers to free trade.”


21. For example, approximately 100 major treaties and agreements dealing with the environment have gone into effect since 1972, though not all remain in force. For a comprehensive list of these treaties, see Patricia W. Birnie & Alan E. Boyle, International Law and the Environment at xxi-xxvii (1992).

Reinventing government means coopting the market to serve collective, public interest ends.

The use of market approaches and rhetoric to secure national public interest ends is, thus, not only politically pragmatic. A regulatory language and approach steeped in the market is more likely to be effective when applied across borders to the global, web-like characteristics of the entities to which national regulation now applies. Indeed, successful government regulation often takes its structure and form from the entities it seeks to regulate. Corporations once were conceptualized, perhaps accurately, as single entities in a place or at least in a single country. Today, the flexibility corporations have to link up, often on a temporary basis, with suppliers, fabricators, or manufacturing plants around the globe means that they are no longer self-contained, hierarchical units located in one jurisdiction. New, flexible corporate structures require new flexible regulatory approaches. Moreover, the low tax, lower regulatory cost strategies used by jurisdictions to compete for domestic and foreign investment necessitate greater attention to domestic regulatory costs than ever before. Market regulatory approaches usually are expected to be cheaper to enforce as well as to implement when compared to the more exacting and demanding command-control sets of rules.

Finally, market approaches to domestic regulation also have politically pragmatic effects, given domestic political realities. For the national government to maintain some of its power and to play an effective regulatory role, it must be efficient and, increasingly, speak the language of a downsizing corporate America. The continued existence of a belief in a national public interest is at the heart of the need for and the ability of the

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24. See, e.g., James M. Landis, *The Administrative Process* 11-12 (Greenwood Press 1974) (1966) ("when government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue"). For an elaboration of this point, see Aman, *supra* note 12, at 2117-19.

25. The concept of the "virtual corporation" illustrates this idea. The "virtual corporation" refers to the idea that, with increasing mobility of computing, corporations can be spread across time zones and around the world, rather than following the traditional corporate design of a single entity in a single place. See Jeremy Rifkin, *The End of Work* (1995).


27. This economic regulatory discourse resonates well with current popular management literature advocating various approaches to a "mean and lean" organization. See, e.g., Peter Senge, *The Fifth Discipline* (1990).
national government to reinvent itself. Coopting the language of the market may further this goal, but on a variety of issues there is increasing debate over whether national governmental action is necessary at all, assuming markets can work at the state and local levels. If, however, globalization is not automatically to mean a return to a loose confederation of states in competition with one another, a continued, if somewhat modified, cautious and less ambitious national regulatory role is necessary. Market rhetoric, market forces and values, and market regulatory approaches may provide the compromise needed between what individual states see as the minimal public interest advantage to be gained by national regulation and the added competitive advantage they might secure in the global market if left to their own (presumably cheaper and more flexible) regulatory and deregulatory devices. Market approaches are less intrusive and usually cheaper to implement in the short run,\(^2\) and, thus, may be a politically more acceptable way for the national government to redefine its role and provide at least some sense of what the national public interest may be in a variety of areas, from welfare to the environment.

For a number of reasons, globalization thus restricts the range of realistic regulatory reforms national government can undertake. Taking a global perspective on domestic regulatory politics helps explain why regulatory reform does not necessarily differ dramatically in outcome when one compares the Reagan, Bush, and Clinton Administrations. The pressures of global competition, the nature of the corporate entities involved, as well as domestic political pressure to minimize costs and maximize discretion at all levels of government militate in favor of new, more market-oriented forms of regulatory reform. Still, it would be a mistake to assume that similarities in outcome imply that there are no significant differences between their market-based positions. There often are very significant differences in both the goals and the assumptions behind the market rhetoric used by reformers today.

The market has very different meanings for different reformers. For some, the global market is just another reason to draw a very bright line between a federal role and the freedom of the private sector. For others, the

\(^2\) Of course, particularly in the environmental arena, if market approaches are not effective and more drastic action is necessary at a later point, such action can be more costly the longer the problem exists. There is a need for more empirical studies dealing with the effectiveness of domestic regulatory regimes that rely heavily on market devices to achieve their ends.
global market is a new factor to be considered when analyzing old regulatory problems—the global market being a factor that militates in favor of more cost-effective, less intrusive approaches to solving regulatory problems.\textsuperscript{29} Still, for others, the global market requires the formulation of new problems and issues in which the linkage between national regulatory regimes and global regulatory regimes is crucial.\textsuperscript{30} Thus, even though all of these administrations advocate market-oriented regulatory reforms, they differ considerably when one considers their fundamentally different starting points.

These differences in premises and goals are significant because they indicate the extent to which one sees market approaches and privatization as an end in themselves, or simply a means to achieving public interest, national goals. For those to whom market rhetoric means privatization and individual freedom, current domestic regulatory reforms are a step in the direction of a laissez-faire domestic and world economy, an increasingly weak national government, and increased devolution of power to the states. Those who see the market as a means to an end in which the national government has a role to play, however minimal, are more likely to approach global issues in a manner that leaves open the possibility of new, global regulatory regimes. Indeed, beneath the similarities of the new domestic public law order emerging are differences in the willingness and ability of the government to harmonize national regulation with global, international regulatory approaches and to support extending the global reach of regulation when necessary.\textsuperscript{31} For those reformers to whom the market represents a new regulatory technique for achieving public interest goals, these national regulatory reforms are seen as connected to an emerging global regulatory order of which GATT, NAFTA, and global agreements

\textsuperscript{29} For a discussion of these different perspectives and how they played out during the deregulatory reforms of the Reagan and Bush Administrations, see \textit{AMAN, supra} note 9.

\textsuperscript{30} Thus, for example, NAFTA was seen by the Clinton Administration as not only a free trade agreement but the start of a process of harmonization of environmental laws in the United States, Mexico, and Canada. For Republican Party reformers as well as many critics of NAFTA, however, the agreement was viewed more as a free trade agreement. They had less interest or faith in the establishment or effectiveness of environmental side agreements.

\textsuperscript{31} The emphasis on markets, rather than harmonization, however, is apparent in recent attempts to add Chile to NAFTA. Chile may be invited to join NAFTA before it revamps or harmonizes its environmental laws. \textit{See International Trade, Grassley Confident on Chile Fast-Track If Labor and Environment Are Kept Out}, Daily Rep. Executives (BNA), Apr. 7, 1995, at 67, \textit{available in LEXIS, News Library, CURNWS File}. 
such as the Montreal Protocol for the Protection of the Ozone Layer are but
the beginnings of a new, more globalized nation-state, one in which
domestic regulation may increasingly look more like international
regulation,\textsuperscript{32} but also one in which greater deference must be paid to the
lawmaking powers of other jurisdictions, including international bodies.\textsuperscript{33}

Part III will develop these themes more concretely by means of a
comparison between the Reagan and Bush Administrations' approaches to
domestic reform and the regulatory reforms currently proposed by the
Clinton-Gore Administration in its attempt to reinvent government. In
general, this comparison helps illustrate not only that the globalization of
politics and markets has important implications for domestic approaches to
regulatory issues, but also that this is a two-way street. Domestic politics
and agents can exert significant controls—both brakes and acceleration—on
the pace and content of globalization. At times, as in the Reagan
Administration, domestic politics and institutions can temper globalizing
deregulatory forces. At other times, as in the Clinton-Gore Administration,
globalization and the domestic political problems it presents can
substantially limit the range of domestic regulatory responses, resulting in
the continuation of essentially market-based approaches to regulation and
continued trends toward deregulation and privatization in a variety of areas.
The result is both the broadening of economic discourses to encompass
values and goals beyond market efficiency, and the narrowing of traditional
regulatory discourses that, often inappropriately, underestimated cost as a
significant limiting factor in achieving certain regulatory ends.

III. Deregulation in the United States

To provide the necessary background for our comparison of the Reagan,
Bush, and Clinton Administrations and to understand more fully the recent
history of deregulatory reform in the United States, it is useful to begin the

\textsuperscript{32} Market-oriented domestic regulation increasingly resembles current international approaches
to issues in that it relies more on incentives, less on coercion, more on the market and less on specific,
substantive rules, and it increasingly deals with entities that truly are global in their makeup and
operation.

\textsuperscript{33} In addition, so-called home-based regulation in areas such as banking may become
increasingly popular. Such approaches recognize that more than market-based regulation may be
necessary in some areas and are willing to allow foreign banks to do business in their country if they
are satisfied that the foreign banks are appropriately regulated by their home-country.
discussion with the Carter Administration. The use of market approaches to regulation and legislative deregulatory reform first began in a major way in that administration. The Carter Administration’s approach to the deregulation of airlines is particularly instructive to our consideration of the regulatory reform similarities and differences among the Reagan, Bush, and Clinton-Gore Administrations.

For the Carter Administration, domestic airline deregulation was both politically pragmatic and, from a microeconomic point of view, theoretically correct. The economic theory underlying deregulation of this industry was not presented as necessarily being anti-government or anti-State, from a political or philosophical point of view. The assumption was that the State should intervene if there was market failure involved. If a market could work, however, State regulation was not necessary, especially if the market was expected to reach results more favorable to consumers than those achieved by regulation. For airline deregulators, there was no market failure when it came to the airline industry. An airplane was, in the words of Alfred Kahn, Chairman of the Civil Aeronautics Board (CAB), simply a “marginal cost with wings.”

The politics of airline deregulation was also decidedly pragmatic from a domestic political point of view. Deregulation promised to lower consumer fares and increase customer service. This reform effort was aimed at the regulation of what once was a fledgling industry, but one that advocates of deregulation now perceived as a regulatory-induced cartel, regulated by an agency captured by the very industry it was designed to regulate.

Safety regulation was excluded from this calculus. That was to continue to be handled, independently, by the Federal Aviation Administration.

34. The Carter Administration also was the first administration extensively to appoint economists to independent regulatory agencies. For example, several appointees to the Interstate Commerce Commission were economists, as was the Chairman of the Civil Aeronautics Board (CAB), Alfred Kahn. See THOMAS K. McCRAW, PROPHETS OF REGULATION 273-82 (1984). The Carter Administration was also the only administration in recent times to abolish a New Deal agency, the CAB.


(FAA). The assumption was that economic competition would not affect safety and, in any event, the Federal Aviation Administration would continue its regulation of these matters. Another key assumption was that real competition would emerge in the airline industry because the antitrust laws in effect would be vigorously enforced. All of this was strongly backed by most Democrats, led by Senator Edward Kennedy. Invoking a return to the market as serving the public interest, Congress abolished the CAB with the Deregulation Act of 1978.

But deregulation by Democrats did not have the cachet that deregulation had during the Reagan revolution, though, in many ways, Democrats were more successful at the legislative reform level. Deregulation took hold as a political rallying cry during the 1980s and the political rationales for deregulation became increasingly shrill and ideological. "Getting government off the backs of people" was the slogan of the day. This was necessary not simply because markets might work in many instances where regulation was then the norm, but also because some deregulators believed that most State intervention interfered with fundamental political liberties. Some advocates of deregulation in the Reagan Administration thus had a principled complaint: government was not only incompetent and costly, it also interfered with individual economic freedom. Those that took this view tended to see potential market successes everywhere. Those who were more pragmatic tended to have a greater sense of the potential for market failure and the need for regulation—at the very least to ensure that a market could be established, or, more broadly, to ensure there was an opportunity for a collective public response to important economic policy issues. The more radical, philosophically-oriented deregulatory reforms proposed by the

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39. Stephen Breyer, now Justice Breyer, was a staff member of the Judiciary Committee, chaired by Senator Kennedy, and was one of the primary staff architects of these proposals. See STEPHEN BREYER, REGULATION AND ITS REFORM 317-40 (1982).


41. For a discussion of how the bureaucracy actually grew during the Reagan years, see AYRES & BRAITHWAITE, supra note 22, at 7-10.
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Reagan Administration and their political effectiveness are more fully understood by examining the global context in which they were proposed. There was a significant global backdrop to the deregulatory initiatives of the 1970s and especially the 1980s that gave added impetus to the political viability of these reforms. This is particularly apparent when we look beyond domestic airlines to manufacturing industries in general. Intense global competition in a number of key industries has been increasing ever since the countries most devastated by World War II—Germany and Japan—were able to rebuild and then re-enter the global economy. Moreover, other, lesser-developed countries began successfully to enter the economic fray. Industries long thought of as mainstays in the United States—the auto industry, the steel industry, the electronics industry, to name just a few—began to decline. They were being defeated by global competitors who could produce similar or even better products at less cost.

Global competition was a compelling reason for domestic deregulatory reform. The domestic refrain of “We’re No. 1” masked the reality of our new global context, which was that the United States, while still perhaps the largest economy in the world, was no longer the only major economic power. It was losing some of its global economic power, but all of its essentially unchallenged control of the global market place. More importantly, for purposes of understanding the convergence of global forces and domestic rhetoric, that loss easily and plausibly could be represented by domestic politicians as one of the predicted consequences of overregulation, especially federal regulation. Such representations were self-fulfilling. The Reagan-Bush regulatory discourse used this new global context to reinforce an ideological preference for private ordering. Lower taxes meant less money to fund governmental agencies, regulatory programs, and initiatives and, in response to the growing deficit that resulted, required more governmental austerity. In effect, this put substantial pressure on the federal government to downsize, not unlike much of corporate America.

The Bush Administration largely continued the policy thrust of the domestic deregulatory program begun in earnest by the Carter Administration in the 1970s, and pursued in a more ideologically forceful,

44. Id. at 141.
if less legislatively successful manner, by the Reagan Administration throughout the 1980s. The Bush Administration, however, linked its domestic deregulatory reforms even more directly with the need for domestic industries to compete globally. For example, it established the Council on Competitiveness headed by Vice President Dan Quayle. This body had as its primary task the rejection of proposed and existing regulations that it believed undermined U.S. global competitiveness. Competitiveness and, presumably, U.S. jobs in U.S.-based industries were sought and anticipated as the likely results of an aggressive, deregulatory, anti-government campaign.

From a global perspective, a deregulatory approach grounded in individual freedom easily accommodated a vision of the State as relatively independent and a distinct and sovereign member of the international community of States, a State that was, in fact, flexing its muscle as it deregulated in the face of new realities. Deregulation under Reagan-Bush responded to globalization by recasting its effects into domestic causes that securely tied the globalization of markets, politics, and law to the very immediate concerns of local politics. For these administrations, big government was the problem. Private enterprise, large and small, was the answer.

The laissez-faire philosophy and the domestic political rhetoric often reminiscent of the 1920s coincided perfectly with the domestic political

45. The Reagan Administration was not successful at repealing any significant statutory programs; instead it adopted a court and agency-oriented strategy. AMAN, supra note 9, at 43-44. The success of this strategy depended in large part on the nature of the regulation and the agency itself. The Reagan Administration lost its major court battles in health and safety areas, while it was more successful in communication and commercial areas. See infra notes 49-50 and accompanying text.

46. President Bush's memorandum imposing a moratorium on new regulation and a review of old regulations sought to eliminate costs and advance economic growth, thereby furthering our global competitiveness. President Bush first announced this moratorium in his 1992 State of the Union Address, stating:

I have, this evening, asked major Cabinet departments and Federal agencies to institute a 90-day moratorium on any new Federal regulations that could hinder growth. In those 90 days, major departments and agencies will carry out a top-to-bottom review of all regulations, old and new, to stop the ones that will hurt growth and speed up those that will help growth. President's Address Before a Joint Session of the Congress on the State of the Union, 28 WEEKLY COMP. PRES. DOC. 170, 172 (Jan. 28, 1992). Bush extended the moratorium for another 120 days, and again until the expiration of his term. President's Remarks on Regulatory Reform, 28 WEEKLY COMP. PRES. DOC. 726, 727 (Apr. 29, 1992); Remarks Accepting the Presidential Nomination at the Republican National Convention in Houston, 28 WKLY. COMP. PRES. DOC. 1462, 1466 (Aug. 24, 1992).

47. Corporate downsizing and productivity gains, however, seemed to cut jobs at a faster rate than cost savings generated by deregulation could create them.
needs of the conservative administrations of the 1980s. Ironically, deregulation could thus be seen as a strong, State-centered approach to a global challenge, as if dismantling the administrative State was but one of many free choices open to a sovereign State. Applying a global perspective to these events, however, makes clear that it was also the weakness of the State due to the impact of global economic forces beyond its political control that made some version of this legal and political response inevitable. To characterize deregulation and a more minimalist approach to national government as a victory for the forces of economic freedom had a certain domestic political effect. What was, to some extent, an inevitable trend from a global point of view, was embraced as a brave, ideological choice to underscore the fact that States should not interfere with private enterprise. The current refrain that U.S. citizens want a smaller, or at least more efficient, national government implies that there is a choice in this matter when, in fact, there may not be.

There were, of course, relatively easy ways to accomplish the deregulatory reforms proposed by Reagan-Bush reformers. Congress could have amended or repealed the laws that created and empowered existing federal agencies—especially the New Deal agencies. Congress, however, especially the Democratic Congresses in existence during most of the 1980s (and the Democratic House throughout this time), was not about to deregulate so completely or in an across-the-board manner. The forces of globalism that Reagan-Bush so effectively translated into an ideological form of domestic reform were, ultimately, constrained by Congress and the courts.

As I have written elsewhere, the Reagan-Bush deregulatory strategy eventually sought to by-pass the Congress by using the courts and the agencies themselves to achieve its deregulatory goals. But deregulating pursuant to the very statutes that created the regulatory structures these administrations sought now to remove, required that these agencies infuse their regulatory regimes with market approaches, if not market ideology. Courts were generally willing to approve of agency attempts to rescind rules if they could plausibly argue that the market forces they sought to substitute were in the public interest. The courts usually were not inclined,

48. AMAN, supra note 9, at 43-44.
49. This is well illustrated by the federal court cases that arose out of the deregulation of both the Federal Communications Commission (FCC) and the Interstate Commerce Commission (ICC). The
however, to allow market forces to substitute for regulatory approaches where Congress, particularly in various health and safety statutes, had rejected the market.\textsuperscript{50} Nor were the courts willing to adopt constitutional judicial reaction to deregulation of the FCC was generally favorable, given the nature of the congressional mandate, and the changed perception for the need to regulate the broadcast industry. See, e.g., Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983). This case concerned the FCC's decision to deregulate the commercial radio industry by eliminating quantitative processing guidelines for nonentertainment programming, formal ascertainment procedures, commercialization processing guidelines, and programming log requirements. \textit{Id.} at 1419. The FCC's deregulation was based on the belief that "current conditions in the radio marketplace permit the Commission to reduce direct government control of licensees while still remaining faithful to its statutory mandate to regulate in the public interest." \textit{Id.} at 1420.

The court agreed, upholding all of the deregulation decisions except the elimination of the program log requirement. \textit{Id.} at 1443. The court found nothing in the Federal Communications Act, 47 U.S.C. §§ 151-613 (1988)—the FCC's enabling statute—to prevent deregulation. The statute's mandate, that of a broad-based public interest standard, gives the FCC a great deal of discretion to formulate its public policy goals. 707 F.2d at 1432.

Like the FCC, the Interstate Commerce Commission (ICC) also has been fairly successful at deregulation. When the ICC was founded, Congress was primarily concerned with the railroads' monopoly power. Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (1887) (current version in scattered sections of 49 U.S.C.). By the mid-1900s, however, the railroads no longer held such a dominant position. In 1980, Congress responded to this change by passing legislation designed to increase the flexibility of action under the current regulatory scheme. See Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895 (1980).

Congress believed that decreased regulation would translate into increased competition, thus enabling the rail industry to provide services more effectively. See H.R. CONF. REP. NO. 1430, 96th Cong., 2d Sess. 79 (1981). Congress also passed several statutes to effectuate its deregulation goals. 49 U.S.C. §§ 11343(e), 10505(a), 11343(e) (1988).

For the most part, the ICC's deregulation has been upheld. See, e.g., Baltimore & O.R.R. v. ICC, 826 F.2d 1125 (D.C. Cir. 1987) (holding that in measuring the potential harm to users of railroad track that the railroad sought to abandon, the ICC could consider the possibility of the user purchase of or subsidy to the railroad's operation); Illinois Commerce Comm'n v. ICC, 819 F. 2d 311 (D.C. Cir. 1987) (upholding ICC exemption for trackage rights agreements); Baltimore Gas & Elec. Co. v. United States, 817 F.2d 108 (D.C. Cir. 1987) (upholding ICC's promulgation of regulations for competitive access hearings).

There are some exceptions to the cases listed above. See, e.g., Regular Common Carrier Conference v. United States, 820 F. 2d 1323 (D.C. Cir. 1987) (holding that ICC impermissibly granted an exemption from a prior approval hearing to a railroad seeking to acquire six trucking companies); General Chem. Corp. v. United States, 817 F.2d 844 (D.C. Cir. 1987) (holding that ICC's determination that railroads were not market dominant was arbitrary and capricious).

Commentators have pointed out that there was some tension between the courts and the ICC concerning deregulation, but this tension is not based on philosophical grounds. Instead, the courts were constrained to permit certain deregulation because it conflicted with statutes that remained in force. Until Congress clarifies the situation by repealing the conflicting statutes, the courts will be forced to abide by them. For a detailed commentary on the ICC's deregulation efforts, see Mary A. Wallace, \textit{The D.C. Circuit Review: Interstate Commerce Commission}, 56 GEO. WASH. L. REV. 937 (1988). President Clinton has proposed to abolish the ICC altogether. See generally Robert Pear, \textit{The Clinton Budget: The Overview}, N.Y. TIMES, Feb. 3, 1995, at A1.

\textsuperscript{50} See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins., 463 U.S. 29 (1983). In this case, the Supreme Court upheld the D.C. Circuit's holding that the National Highway Transportation
separation of powers arguments that would, in effect, render certain New Deal agencies unconstitutional because they unduly interfered with Executive power. Quite apart from the ideological fervor with which deregulation was proposed, the result was that national politics and national institutions, especially the courts, limited the extent to which the Reagan and Bush administrations could go in this regard. Most New Deal agencies remained in place, though many were less active and much more market oriented. The deregulation and market approaches upheld by the courts were viewed as public interest governmental responses to regulatory issues.

How different is the Clinton-Gore approach from that of Reagan and Bush? And how different are the Reagan-Bush proposals once they were tempered by Congress and the courts? Rather than reject outright or substantially impede the regulatory role of the federal government, as the Reagan and Bush Administrations unsuccessfully sought to do in many cases, and certainly as the new Republican legislative majority in the House

Administration (NHTSA) had failed to provide an adequate explanation for repealing the passive restraint standard. This standard required automobile manufacturers to install passive restraint devices in all new automobiles over a three-year period beginning in September 1981. Shortly after assuming office, the Reagan Administration decided to delay implementation of the rule for one year, citing numerous cost and compliance problems. In addition, the delay was designed to give the NHTSA time to review the entire passive restraint issue, opening up the possibility that the standard would be completely rescinded. Because of this possibility, several insurance companies and consumer groups brought legal action to challenge NHTSA's rescission of the standard. See AMAN, supra note 9, at 63-77; see also Larry W. Thomas et al., The Courts and Agency Deregulation: Limitations on the Presidential Control of Regulatory Policy, 39 ADMIN. L. REV. 27, 32-34 (1987).

For other cases adverse to the Reagan Administration's deregulation attempts at the agency level, see Public Citizen v. Steed, 733 F.2d. 93 (D.C. Cir. 1984) (invalidation of NHTSA's indefinite suspension of treadware grading standards); Int'l Ladies' Garment Workers' Union v. Donovan, 722 F.2d. 795 (D.C. Cir. 1983) (invalidation of the rescission of a thirty-nine year-old regulation prohibiting homework in the knitted outerwear industry); Public Citizen Health Research Group v. Auchter, 702 F.2d. 1150 (D.C. Cir. 1983) (holding that the Occupational Safety and Health Administration had abused its discretion in not issuing an emergency standard reducing worker exposure to ethylene oxide).

51. See AMAN, supra note 9, at 9-13. 52. One way of highlighting the impact of deregulation at the agency level is by noting the significant shift in the numbers of Administrative Law Judges functioning in economic regulatory agencies such as the FCC or the ICC, which were often the targets of the deregulatory reforms of the 1970s and 1980s. "Shortly after the APA was passed, there were 196 ALJ's—64% of whom (125) were assigned to economic regulatory agencies and 6.6% (or 13) to the Social Security Administration. By 1984, there were 1121 ALJ's.... Only 6.5% or 73 ALJ's were in the 12 economic regulatory agencies, while 67.8% or 760 ALJ's were in Social Security." ALFRED AMAN & WILLIAM MAYTON, ADMINISTRATIVE LAW 200 n.7 (1993) (relying on a study by Jeffrey Lubbers of the United States Administrative Conference).

53. See, e.g., cases cited supra note 49.
of Representatives now seeks to do, again, the Clinton Administration seeks to reinvent government largely in the image of a lean and cost-effective government corporation. The regulatory politics in the 1990s has a distinct corporate rhetoric that continues the privatizing trend, but in a manner that keeps the federal government involved and a collective sense of a national public interest relevant. Government is not being rejected as ideologically inappropriate, but it is being converted to forms, approaches, and goals that do not differ substantially from those of the private sector. Rhetorically, the Clinton-Gore approach remains positive in terms of the role to be played by the national government. When it comes to translating their proposals into law, however, most of the regulatory approaches proposed are very much steeped in the market and are of a piece with the general direction of regulatory reform for the last twenty years. Part IV will now examine some of the reinvention of government rhetoric and some of the reforms it generates.

IV. REINVENTING GOVERNMENT AND CORPORATE RHETORIC

If it was Congress and the courts that filtered and limited the more stridently ideological aspects of the Reagan and Bush Administrations' deregulatory attempts, it is arguably the globalization of markets, capital, and economic problems that limits the way in which regulatory reform is now conceptualized, even by those who are not philosophically opposed to an activist national government. The National Performance Review (NPR or the Report), a report written largely under the direction of Vice President Gore, must be read against a global backdrop of increasing global

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competition for markets and investment, declining nation-state sovereignty and power, and a view of the nation-state that sees as one of its primary roles the attraction and retention of jobs and a high level of economic prosperity within its borders. Seen in this light, the language of public law and the regulatory policy it creates continues to rely heavily upon market approaches, rhetoric, and goals. But unlike the Council on Competitiveness headed by Vice President Quayle, the Gore Commission viewed the national government in essentially a positive light. It was not the government versus the market, but an instance of the government coopting the market.

The Report begins with the premise that government to date has been inefficient and needs to be changed, not because it is philosophically wrong for the national government to play an active regulatory role, but because it can be more efficient in the way it operates and the way it defines and approaches its goals. The first chapter, entitled “Cutting Red Tape,” thus focuses on governmental functions similar to those of most businesses and makes recommendations for streamlining the budget process, decentralizing personnel policy, and streamlining procurement, as well as focusing on more purely governmental tasks such as reorienting the Inspectors General, eliminating regulatory overkill, and empowering state and local governments.

Flexibility, decentralization of authority, efficiency, and least-cost alternatives to achieving goals set collectively and not solely through the market are the main themes of this chapter. Government is not in opposition to the market, rather government seeks to make use of the market and market forces to further more efficiently and cheaply collective, public interest goals.

The Report also suggests a new rhetoric for defining the relationship of the individual to the State. The next chapter, entitled “Putting Customers First,” sees citizens as customers. The federal government is to become

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58. Id. at 13.
Thus, this chapter considers how to "give customers a voice—and a choice"; how to eliminate unnecessary government monopolies, making service organizations, such as the Government Printing Office, compete; how to create market dynamics within the public sector; and how to use market mechanisms to solve problems. Here, the explicit assumption is that:

[government cannot create a program for every problem facing the nation. It cannot simply raise taxes and spend more money. We need more than government programs to solve our problems. We need governance. Governance means setting priorities, then using the federal government's immense power to steer what happens in the private sector.]

Reliance on incentives, direct guidelines, and the force the government can wield when it acts as a consumer are emphasized.

Chapter Three, entitled "Empowering Employees To Get Results," continues the Report's essentially corporate, managerial focus. It seeks to improve the quality of government by improving government's ability to manage. Thus, it recommends that agencies decentralize decision-making power within the government and then hold individual governmental managers accountable for their results. It advocates giving federal workers the tools they need to do their jobs, including employee training, new information technology and the training to use it, and the development of a strategic plan for effectively using information technology throughout the federal government.

Chapter Four, entitled "Cutting Back To Basics," focuses on how to eliminate governmental waste, defined as obsolete programs, duplicative programs, or special privileges. "Cutting Back" also has a revenue side.

59. Id. As Vice President Gore states in the Report: "A lot of people don't realize that the federal government has customers. We have customers. The American people." Id. at 43 (quoting Al Gore, Town Meeting, Dept. of Housing and Urban Development (Mar. 26, 1993)).

60. National Performance Review, supra note 55, at 44. The Report states, "[w]e will use federal powers to structure private markets in ways that solve problems and meet citizens' needs—such as for job training or safe workplaces—without funding more and bigger public bureaucracies." Id.

61. Id. at 62.

62. This chapter also discusses how to enhance the quality of work life for federal employees, noting a strong correlation between employee and customer satisfaction. Finally, chapter three seeks to promote a labor-management partnership. Id. at 65-91.

63. Id. at 94.
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It advocates collecting more money for the government's use from greater reliance on user fees, better debt collection, and the elimination of fraud.\(^64\) At the same time, there are to be investments in greater governmental productivity.\(^65\)

The NPR, in short, treats government like a business because government buys and sells goods in the process of carrying out its functions. In addition, it is expected to deliver its services—regulatory and otherwise—as efficiently as possible. When government acts as a buyer or, in effect, a consumer, it needs to do so efficiently. Still, government is so unusually large a customer that it cannot ignore the impact it can have on the modification, creation, or destruction of markets. When it acts as a seller of services, citizens are its customers. Throughout, the Report thus emphasizes that the government, in both its roles as provider and consumer, is like any good business or smart consumer. It must be flexible, capable of rapid change, and efficient. These essentially market values result in legal approaches to regulation that are not significantly different in content or direction from those previously advocated by the Reagan and Bush Administrations.

What implications do the market metaphor, rhetoric, values, and goals have for new forms of U.S. public law in the 1990s, quite apart from whether they are proposed by Democrats or Republicans? The next subsections examine three specific areas: (1) providing for agency revenue by new indirect and direct approaches to agency finance; (2) new governmental agency structures that are based on private models; and (3) market-based approaches to agency regulation.

These examples increasingly are typical of the way the administrative state in the 1990s is conceptualized. They represent the national government's attempt to remain relevant in a global world of increasing competition and declining national importance and sovereignty. They also suggest the following hypothesis: the larger the scale of the regulatory undertaking, the more minimalist and market-oriented the regulatory

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64. Id.

65. Id. The Report recommends the elimination of bias against long-term governmental investments in productivity-enhancing equipment such as computers, and the creation of agency innovation funds. The Report advocates reallocation of agency budgets with a view towards cutting costs and freeing up funds for investments in productivity, such as computers. Id. at 110-11. The Report concludes by recognizing a need for wholesale change, including the cultural change necessary for sustaining fundamental change and increased risk-taking. Id. at 121-22.
approaches are likely to be. When the global marketplace is viewed as "everyplace," the ability of global entities operating in that marketplace to choose other regulatory environments makes rather loose national market regulatory approaches more likely. The result is the emergence of a new mix of private and public approaches to national regulatory regimes.

A. Financing Agency Regulation

Lower taxes and deficit reduction have meant significant cuts in agency budgets. President Clinton came into office advocating a fourteen percent reduction in administrative costs in most agency budgets over a four-year period. This type of budget cut makes it more difficult for governmental entities to carry out their missions, unless they redefine their goals, reallocate responsibilities, and realign priorities. Of necessity, this requires new approaches to agency financing.

1. Indirect Agency Financing

Enforcement of most regulatory regimes is costly and requires a large number of lawyers and staff, and often litigation, to be successful. One indirect form of financing agency action is to cut back on some agency activities and reallocate funds elsewhere. Less enforcement is one likely candidate for cutting; however, this theoretically can be more than just a cost-saving strategy. It may coincide with a change in regulatory approach as well, with a shift from specific rules to more industry-based standards, guidelines, or goals. As law and regulation become less specific and

68. See, e.g., Mitchell Loein, Gore Plan Depends on Defeating Entrenched Interests, CHI. TRIB., Sept. 6, 1993, at 1.
69. Examples of industry-based standards include the EPA's "bubble concept" and certain contractual approaches to environmental regulation. In the "bubble concept," the EPA places an imaginary boundary device . . . over a polluting plant or other facility with many individual sources of air pollution emission. Instead of regulating emissions from each smokestack, pipe, or fugitive emission source, only the total pollution of the plant is regulated—as if it was coming from a single imaginary outlet in the bubble.
Similarly, "environmental contracting" entails
more goal oriented, either on a regional or industrial basis, enforcement can become less individualistic, and, in that sense, perhaps, less costly. Whether it will be as effective remains to be seen, but at this point, one can assume that enforcing a more general set of guidelines or market-oriented rules will not necessarily result in less effective regulations.

Other ways of partially financing agency missions involve a reconceptualization of what the agency’s mission actually is, and the extent to which it allows market forces to achieve its goals. As we shall see below, using the market as a regulatory tool may have salutary budgetary effects, since it may make assumptions about compliance with certain agency standards easier to make than if specific regulations were involved. Optimistically, such approaches could also reduce litigation, since compliance on the part of the regulated should be easier to achieve.

2. Direct Agency Financing—User Fees

New direct approaches to financing federal regulation involve the use of agency user and filing fees. In some instances agencies’ abilities to charge fees are limited in that they are allowed to impose fees only for activities that directly benefit specific persons. Nevertheless, there has been growing acceptance and use of increased filing fees as a means of raising agency revenues. The Prescription Drug User Fee Act of 1992, for example, will allow the FDA to collect user fees of more than $325 million over five years from research-based pharmaceutical companies.

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a negotiated agreement between government authorities and industry on comprehensive targets and timetables for reductions of pollution or other risks in lieu of unilaterally imposed, piecemeal regulatory requirements for specific types of pollution from particular sources or process units.

Stewart, supra note 12, at 2090.

70. The FCC, especially throughout the 1980s, significantly redefined its role in such a way as to make market reforms and approaches appropriate. See supra note 49.


73. The Prescription Drug User Fee Act created several new kinds of fees, including application fees, annual product fees, and annual establishment fees. Application fees, paid one time for each application for approval of a prescription drug product, began at $50,000 per application for which clinical data with respect to safety or effectiveness were not required in 1993 and will increase to $116,000 by 1997. For applications requiring clinical data with respect to safety or effectiveness, the
Total fee revenues were projected as $36 million for 1993, increasing each year until 1997 when the projected revenue is $84 million. All revenues from user fees will be dedicated to the sole purpose of new product approval. These fees are in addition to existing FDA appropriations and will increase the resources that the FDA devotes to reviewing prescription drug applications. The fees are expected to cut drug approval time almost in half, with a goal of approving breakthrough drugs in six months and all drugs within twelve months from the time a complete new drug application is submitted. Previously, the FDA simply did not have the resources to process applications for new products promptly.

User fees can also serve several other important purposes, beyond simply raising revenues. These purposes include encouraging more efficient allocation of services between government and the private sector as well as encouraging privatization of governmental activities. The expected distributional effect of fee-based governmental service is that less of a service will be demanded so that the decision to reject or employ a user fee is best viewed as based on a desire to induce a socially-optimal amount of the underlying good or service. Setting user fees thus allows government to have an effect on the market without direct regulation.

As for privatization, the way in which the user fees are designed can have significant implications for the development within the private sector of alternative sources and complementary services. Privatization concerns are an extension of efficiency reasoning; some goods are most efficiently supplied by the government, but could be privately supplied. User fees are thus appropriate, but if the fees are set too low, the government will be inefficiently discouraging competition. Setting fees at efficient levels would invite competition from private producers and thus permit discovery of whether a market failure really does exist.

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application fees are approximately twice as expensive. Without the application fee, an application will be considered incomplete and will not be considered for approval. Annual product fees are imposed on prescription drug products each year after they have been approved. The fee per product was $6,000 in 1993, and will increase to $14,000 for 1997. Annual establishment fees are imposed on plants used to manufacture prescription drugs. Each establishment that manufactures at least one non-exempt prescription drug is subject to an annual fee, which was $60,000 in 1993 and will increase to $136,000 in 1997.

75. Id. at 801.
76. Id. at 822.
77. Other agencies, such as the Federal Energy Regulatory Commission (FERC), also rely on fees.
Budget realities make agency financing reform necessary. The nature of the reforms themselves allows the various combinations of public and private approaches to regulation itself and the tension between complete rejection of governmental involvement and the reinvention of government continually to express itself in the various choices that must be made between total privatization and various degrees of market-based regulation.

B. Agency Structure—A Private-Public Model

In addition to new forms of financing, new regulatory structures also are beginning to emerge in new contexts. The New Deal agency structure created a governmental entity expected to be above the political fray—the independent regulatory commission. These collegial commissions usually consisted of five or seven administrators appointed for a term of years, during which they could not, effectively, be removed. The 1970s brought forth a much more executive-oriented administrative form, such as the Environmental Protection Agency, as well as greater emphasis on executive cabinet-level agencies, such as the Department of Labor and the Department of Commerce. These agencies had a single cabinet member of the executive branch at their head who served at the pleasure of the President. During the 1980s, the constitutional viability of independent agencies was very much in question, but the Supreme Court rejected opportunities to adopt separation of powers approaches that could, in effect, result in declaring certain federal independent commissions unconstitutional.78

The new issues of agency structure emerging in the 1990s seem very much tied to new mixes of public and private power, including the occasional adoption of an explicitly private corporate form or structure to carry out the public’s business. The Clinton Administration’s proposal, for example, for restructuring the Federal Aviation Administration is instructive in this regard. This proposal would remove the air traffic control system

FERC charges filing fees, which are updated annually. Most of the fees are based on cost data from the most recent year. As of yet, Congress has been unwilling to consider the private benefit received by the user, and to charge accordingly. Nevertheless, fees may be linked to the costs of running the agency. FERC is expected to recoup substantial costs by charging such fees. Thus, the charges are perhaps lower than those that the market would set, but the budgetary concerns are still met. There is probably a “user surplus,” meaning that the users would be willing to pay a higher price, so they receive a benefit from getting the service at a lower price. Id. at 844.

from the FAA and make it a wholly government-owned corporation called the U.S. Air Traffic System Corporation (USATS). The Report "recommends that an independent [Air Traffic Safety] Corporation be established that would be responsible for controlling air traffic, maintaining ATC equipment, modernizing facilities, performing research into future ATC system needs and supporting national defense activities." The FAA would retain its "regulatory and safety functions, along with safety oversight of the USATS."

The USATS would be governed by a Board of Directors, consisting of the Secretary of Transportation (or designee), the Secretary of Defense (or designee), eight members appointed by the President and confirmed by the Senate, and a C.E.O., who will be chosen by the Board. The appointed members would represent commercial and noncommercial aviation interests, airports, labor, and the business community.

The primary reasons for proposing the USATS relate to problems with acquisitions. Equipment becomes obsolete and government rules and procedures have made the FAA unable to employ new technologies effectively. Unlike other federal agencies, the FAA currently is charged with the operational responsibility of providing a safe, orderly, and expeditious system of air traffic control that is international in scope and serves both civil and military users. It is also involved in a highly technical field and the annual appropriations process is made even more difficult due to the high-technology, capital-intensive nature of the equipment it needs and must purchase. The FAA's tasks are made even more complicated by both its organization as a public agency and its lack of ability to enter into long-term relationships and to plan procurement before the budgetary process makes the necessary money available to purchase needed new equipment. The FAA's budget grew during the 1980s, but the growth was compensating for underfunding in previous years. Now that the budget growth appears to be at an end, the infrastructure of the air traffic control system is still woefully out of date.

80. Id. at 46.
81. Id. at 47.
82. Id. at 48.
83. Id.
No federal agency currently has the ability to use long-term financing for capital investments. Without accurate information regarding budgets beforehand, the FAA cannot enter into contractual obligations without having the funds in hand to pay for them. By allowing access to private capital markets and reducing procedural steps required for acquisitions, restructuring would allow the USATS to overcome these obstacles. Therefore, the truly innovative characteristic of USATS is its financing structure. As a financially autonomous corporation, USATS would be able to finance capital improvements by borrowing from the Treasury or, when cost-effective, from private capital markets. The Secretary of Transportation would be able to disapprove borrowing under limited conditions, in consultation with the Secretary of the Treasury. To borrow on private markets, USATS would have to demonstrate to the Secretary of the Treasury that doing so is a sound business decision. Financing from the private markets would provide an incentive to be efficient.

The corporation would be largely outside the normal regulatory regime as it would be “freed from government acquisition, personnel and budget constraints.” USATS would be responsible for operating the overall technical system, while the FAA would continue to retain the authority and mandate to regulate air traffic safety.

Currently, there are seven other government corporations financed by combinations of user fees, appropriations, and grants. Of these eight entities, USATS would be the only one to be financed by debt, if, as proposed, USATS is allowed to use debt-financing as part of a long-term investment strategy to upgrade the system.

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84. *Id.* at 37-38.
85. *Id.* at 124-25.
86. The proposed corporation is supposed to be self-sufficient, relying on user fees. The Air Traffic Report states that user fees will be set to encourage use of air traffic control safety services. It also states that user fees will be set at the level of current taxes for one year. However, in 1993, aviation taxes provided revenues of $5.1 billion, while the FAA’s budget authority was $9.1 billion. The Air Traffic Report resolves this by planning on receiving $1.1 billion in interest from the Trust Fund, $0.7 billion from the principal of the Trust Fund, and $2.2 billion from the General Fund in the first year of operation. *Id.* at 124-31.
87. *Id.* at 51.
88. *Id.* at 47.
89. A similar entity to the proposed FAA corporation is the United States Postal Service (USPS). The USPS is the only current government corporation that began as a large government agency. Similar to the USATS plan, the USPS had an objective to become self-sustaining, a goal which it has met. Perhaps a good sign is that the USPS is considered more efficient than its federal predecessor. *Id.* at 152.
The hope is that such a corporation will be more businesslike and that such a structure would permit USATS to overcome chronic impediments to good management including government procurement regulations, an inflexible personnel system, and an inability to seek outside financing for long-term projects. Removing the constraints of governmental procedures is intended to allow the air traffic system to operate more efficiently and to encourage better productivity while not adversely affecting safety standards.

The proposed USATS is not without its critics. Some raise the question of whether safety will truly be improved (or at least remain at the same level) if one body has primarily financial oversight functions to perform while another has the daily contact with the system, and thus the greater familiarity with the system.

For our purposes, however, the structure and goals of the proposed corporation are illustrative of the new ways in which public and private power can be conceptualized and combined.

C. The Market as a Regulatory Tool

Not only are the financing and structure of agencies moving in market directions, but the actual regulatory output of agencies looks more and more like the market. As noted above, market-oriented, incentive-based regulation may be easier to enforce than command-control approaches. It also seeks to minimize the cost of regulation to the regulated and to channel market forces in a way that maximizes the overlap between the public interest and individual, corporate private interests. The NPR thus strongly advocates, where possible, the use of market approaches to regulation, rather than more intrusive and costly command-control forms of regulation.

By implication, however, such a regulatory approach is more concerned with an overall sense of direction than with precise results. The law that results is likely to be less demanding on both government and industry. It

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90. Id. at 1-9.

91. See, e.g., 140 Cong. Rec. H2946, H2947 (daily ed. May 3, 1994) (statement of Rep. Oberstar). “Reforms that do not dismember the FAA, we believe, are likely to be more effective, less costly to taxpayers, and to the traveling public and bring greater assurance of continued safety . . . .” Id. (emphasis added). Another criticism is that the perceived problems could be fixed without forming a separate corporation. For example, the FAA procurement system could be streamlined by Executive Order. To this end, the Secretary of Transportation has been ordered to study alternatives to the current system other than a separate corporation.
is less demanding on government because it may be easier or less costly to enforce. It is less demanding on industry because it seeks to channel, rather than change, aspects of an industry's operation that arguably are in the industry's own self-interest.

An example of this approach is the Clean Air Act Amendments of 1990 (CAA).\(^92\) The CAA uses a marketable permit system for sulphur dioxide emissions. Congress uses economic-based systems in cases where the program objective is to assure a "specified level of aggregate emission reductions."\(^93\) The premise is that it does not matter from which sources pollution originates; rather, the emphasis is on decreasing the total amount to a set level. This type of market approach is particularly effective where it is accompanied by an aggressive tracking system to assure that the expected emission reductions are, in fact, achieved.

A market program will produce emission reductions in those areas where reduction is least expensive and emissions will continue in areas where it is very difficult or expensive to reduce emissions. Those who sell their permits will have funds to further reduce their emissions or to investigate new methods of doing so. Such an approach and program should lead overall to a lower level of emissions.

Other forms of market-based regulations include greater reliance on taxes, rather than regulation, even market-based regulation. The imposition of higher costs on certain actors forces them to internalize external costs. User fees, as discussed above, can also have regulatory effects.

Both the collection and dissemination of information can also play a major regulatory role. When airfares were deregulated and the service level of some airlines subsequently seemed to drop rather than improve, the Department of Transportation required reports from the airlines regarding lost luggage, on-time arrivals, and the like.\(^94\) Providing consumers with information concerning their effectiveness was, thus, an effective but non-directive form of regulation.

Such approaches continue to provide a role for the national government. Moreover, they link up conceptually with globalization and global legal

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regimes in interesting ways. Since enforcement and monitoring are two of the most significant problems encountered by international regulatory regimes, domestic regimes that seek to minimize enforcement costs and intrusiveness, while still trying to accomplish certain regulatory ends, may provide important models for international regulatory approaches. Moreover, given the global aspects of domestic regulation discussed above, it is not surprising that domestic and international regulatory approaches begin to resemble one another.

All of these changes—in agency financing, organization, and the form and substance of agency regulation—may (and, in fact, do) raise a variety of domestic political and legal issues that are beyond the scope of this paper. I wish, however, to conclude by returning to Luard's proposition regarding local politics and to our consideration of the relationship of place to globalization and place to law.

95. For example, several constitutional issues arise from the imposition of user fees. Although Congress clearly has the ability to collect user fees, as a practical necessity it must delegate that power to the various federal administrative agencies; however, various challenges to the agencies' ability to charge such fees have been brought.

In the companion cases of National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), and Federal Power Comm'n v. New England Power Co., 425 U.S. 345 (1974), the Supreme Court gave its interpretation of the Independent Offices Appropriation Act (IOAA)—the primary statutory authorization for the imposition of user fees. 31 U.S.C. § 9701 (1988) (the cases refer to an older version of the statute, 31 U.S.C. § 483(a) (1952)). The Court focused on Congress's ability to delegate a taxing power to federal agencies. In National Cable Television, the majority opinion stated that user fees can only be charged if the payer received some benefit from the provided service; otherwise the fee acts as an impermissible tax. 415 U.S. at 340. A closer reading of the opinion reveals that such a fee could be imposed given the proper congressional delegation. Id. at 340. In the Court's view, the IOAA did not intend to delegate the power to tax to the agencies; however, the opinion suggests that given an adequate congressional mandate and proper procedural safeguards, agencies could impose user fees irrespective of any benefit received by the payer. Id. at 341.

Another constitutional issue revolves around the imposition of user fees for constitutionally protected activities, such as free speech and the freedom of assembly. No per se rule has developed; instead the courts have focused on the effect a user fee would have on the protected activity. The litigation of this issue is concentrated at the state and local levels. See, e.g., Central Fla. Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515 (11th Cir. 1985) (invalidating ordinance requiring police service fees), cert. denied, 475 U.S. 1120 (1986); Eastern Conn. Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir. 1983) (invalidating state department of transportation administrative fee and liability insurance requirement for political march).

Aside from these constitutional issues, there remain a number of statutory interpretation problems with the IOAA. The statute provides little guidance as to which services should require a fee and what amount that fee should be. For a detailed account of these statutory problems, as well as other constitutional issues surrounding user fees, see Gillette & Hopkins, supra note 74, at 822-35.
V. Conclusion

Underlying the regulatory reform rhetorics of the Reagan-Bush and Clinton-Gore Administrations are important philosophical differences regarding the role of government, especially the national government. These differences are now highlighted by the intensity of the anti-government approach currently advocated by the newly-elected Republican legislative majority. These differences have significant implications for the role of law, not only nationally, but internationally as well. Though the actual market approaches to regulatory reform currently employed and proposed by Democrats and Republicans do not differ considerably from one administration to the next, the Clinton-Gore view of the national government as a potentially positive force is a significant departure in terms of how national and global legal approaches might intersect and reinforce one another. In a sense, then, Luard is correct when he observes that national party politics and electoral outcomes do not determine the shape of change. But that is only for the present. In the longer term, it is more likely that stronger legal regimes will develop on a global basis if the global issues involved have a national regulatory counterpart, and if national regulatory approaches are viewed in the context of a positive national governmental approach by the voting public that has the rest of the world also in mind.

A market approach to law—however weak—that respects the role of law at the national level is likely to facilitate U.S. participation in new international legal structures now forming, such as the World Trade Organization (WTO) in GATT, the environmental regimes that may develop regarding climate change, or new provisions extending the Montreal Protocol on the Protection of the Ozone Layer. Those reformers who emphasize privatization and the market as an end in itself, however, supported world trade, but were very skeptical, indeed, of any additional regulatory aspects of that agreement. Many members of Congress, including some who supported the NAFTA, thus expressed opposition to GATT

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96. Interestingly, the dispute over signing on to GATT in the U.S. had little to do with free trade but a great deal to do with whether or not we were willing to be bound by an international dispute resolution tribunal we did not fully control. See Amy Bornus & Douglas Harbrecht, China, Russia, Bosnia—and Congress, Bus. Wk. (international ed.), Nov. 28, 1994, at 16, available in LEXIS, News Library, MAGS File.
because of their more fundamental opposition to the regulatory aspects of the World Trade Organization (WTO). 97

A regulatory approach that uses the market as a means rather than an end in itself can encourage global legal systems to develop more easily. But in terms of this symposium's theme, the more important factor in the future of "reinvented government" will be the extent to which a politics can develop that enables citizens in individual jurisdictions to transcend the idea that their "place" is limited by national boundaries or their own particular geography. A sense of place that is at least regional, if not global, can help focus attention on common issues with a view toward harmonizing domestic legal regimes with the law of other jurisdictions or new international treaties. A sense of place that coincides with the scale of the problems involved by definition acknowledges the common interests essential to successful negotiation, compromise, and conflict resolution. For law to matter nowadays, a flexible sense of place is crucial, since important new law will forge linkages between places in the conventional sense of that term. If, on the other hand, the globe is viewed as simply a composite of potential, largely undifferentiated manufacturing sites, the future importance of law will be impoverished, since such a view of the world does not engage people's sense of self, society, or interests, except in highly restricted terms.

97. The Uruguay Round contains a binding dispute settlement system, which GATT had been lacking to this point. WTO Agreement, supra note 20, art. III. Its proponents argued that the United States stands only to benefit from the changes because in the past it was the United States that raised the most allegations of unfair trade practices. U.S. negotiators actually worked to strengthen the agreement's dispute resolution powers because of this fact. But as power in Congress began to shift to the purely market-oriented reformers, the strengthened dispute resolution system of GATT received the most criticism in the U.S. This was because the market-oriented free trade principles of GATT established a regulatory body to implement them. The World Trade Organization would be a permanent institution with a sizable structure. Among other bodies for specific types of trade, there would be a Ministerial Conference, General Council, Dispute Settlement Body, and Secretariat. Id. art. IV-VI. Each Member would have equal representation in both the Ministerial Conference and the General Council. Id. Yet, it is important to note that the WTO's primary role is only to resolve disputes. As such, it is not a proactive regulatory body with rulemaking powers.

GATT decisions previously required consensus, meaning that a panel ruling could be blocked, but WTO rulings cannot be vetoed. The Uruguay Round now provides for a majority vote if consensus cannot be reached with each Member having one vote. This was the most contentious point for the WTO's critics in Congress. Although he ultimately voted for GATT, the new House Speaker, Newt Gingrich, considered the WTO as the central flaw of the GATT, fearing a loss of sovereignty. Had the measure been voted on by the 104th Congress, rather than the 103rd, it might have failed. See John Maggs, Gingrich Backs Off on Pressure Over WTO, J. COM., June 13, 1994, at A1; John Maggs, Hearings Likely on Claims WTO Would Threaten U.S. Sovereignty, J. COM., May 9, 1994, at A3; Mr. Gingrich's False Alarm on Trade, N.Y. TIMES, May 8, 1994, at D16.